LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
SEP 14 1956
JOHN T. FEY, Clerk

No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1956

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

[redacted]
Solicitor General,

JAMES A. WORTHY,
Assistant General Counsel,
Interstate Commerce Commission,
12th St. and Constitution Ave., NW., Washington 25, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
THE QUESTION IS SUBSTANTIAL	7
CONCLUSION	10
APPENDIX A—Opinion of the United States District Court for the District of Massachusetts in the instant case	11
APPENDIX B—Opinion of the United States District Court for the District of Massachusetts in Stone's Express, Inc. v. United States, et al., 122 F. Supp. 955	14
APPENDIX C—Commission's Order of October 28, 1956	22
APPENDIX D—Judgment of the United States District Court for the District of Massachusetts in the instant case	24
APPENDIX E—Sections of the Interstate Commerce Act	26
APPENDIX F—Pertinent regulations of the Interstate Commerce Commission	28

TABLE OF CASES

American Trucking Association v. *United States*, 344 U. S. 298	2
Interstate Commerce Commission v. *Parker*, 326 U. S. 60	2
Interstate Commerce Commission v. *Stone's Express, Inc.*, 348 U. S. 886	7
Stone's Express, Inc. v. *United States*, 122 F. Supp. 955	2, 6, 9, 10
United States v. *Capital Transit Co.*, 338 U. S. 286	2
United States v. *Pierce Auto Freight Lines*, 327 U. S. 515	2

STATUTES

	Page
Administrative Procedure Act, Section 9 (b) (5 U. S. C. 1008 (b))	3, 4, 5, 6, 8, 9, 10
Interstate Commerce Act:	
National Transporation Policy, 49 U. S. C., preceding Section 1	7
Section 210a (a) (49 U. S. C. 310a (a)) (Appendix E)	7, 8, 9, 26
Section 210a (b) (49 U. S. C. 310a (b)) (Appendix E)	6, 8, 9, 10, 26
Section 311 (a) (49 U. S. C. 911 (a))	3, 4, 7, 8, 9
Section 311 (b) (49 U. S. C. 911 (b)) (Appendix E)	9, 27

REGULATIONS

Extension of Temporary Authorities, Interstate Commerce Commission (49 C. F. R. 2.1–2.4) (Appendix F)	4, 28

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NEW YORK, NEW HAVEN AND HARTFORD RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The Interstate Commerce Commission, appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge United States District Court for the District of Massachusetts in the case under appeal has not been reported, but a copy is

attached hereto as Appendix A. The opinion of the United States District Court for the District of Massachusetts in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955, held by the District Court to be controlling in this case, is annexed hereto as Appendix B. No opinion, other than the findings in its order, was entered in this matter by the Commission. A copy of its order of October 28, 1955, which is in issue, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 by the appellees to set aside an order of the Commission entered under Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) and Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)). The judgment of the District Court from which this appeal is taken was entered on May 25, 1956. A copy is attached hereto as Appendix D. The District Court, by its order of May 29, 1956, stayed its judgment pending this appeal. Notice of Appeal was filed in the District Court on July 17, 1956.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60; *American Trucking Association* v. *United States,* 344 U. S. 298; and *United States* v. *Capital Transit Co.,* 338 U. S. 286.

STATUTES INVOLVED

The statutory provisions involved in this proceeding are:

Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)), which reads as follows:

> Sec. 311. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier by water or a contract carrier by water, as the case may be. Such temporary authority shall be valid for such time as the Commission shall specify but not for more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), which reads as follows:

> Sec. 9. In the exercise of any power or authority—
>
> (a) * * *
>
> (b) Licenses. * * * In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Included for collateral reference, as Appendix E, are Sections 210a (a) and (b) and 311 (b) of the

Interstate Commerce Act (49 U. S. C. 310a (a) and (b) and 911 (b)).

The regulations prescribed by the Commission for the administering of the above-quoted provisions of Section 9 (b) of the Administrative Procedure Act are published in Title 49 of the Code of Federal Regulations, Part 2, Sections 2.1–2.4. The pertinent provisions thereof are set forth herein as Appendix F.

QUESTION PRESENTED

Whether Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by the Commission upon the expiration of the 180 days of operation allowed by the temporary authority.

STATEMENT OF THE CASE

The Commission, by order dated May 18, 1955, issued to Pan-Atlantic Steamship Corporation, under authority of section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)), a temporary authority authorizing it to engage in operations in interstate

and foreign commerce, as a common carrier, between various ports of the United States, for a period of 180 days, to expire on November 14, 1955. Pan-Atlantic, on or about May 5, 1955, had filed with the Commission under section 309 (c) of the Interstate Commerce Act (49 U. S. C. 909 (c)) an application for a permanent certificate of public convenience and necessity to engage in common carrier operations which included those authorized by the temporary authority. It became apparent that the Commission would not be able to conclude the proceedings on the application for a certificate of public convenience and necessity before the expiration of the temporary authority. Accordingly, the Commission, by order of October 28, 1955, authorized Pan-Atlantic to continue to perform the water carrier service authorized by the temporary authority until the further order of the Commission, but not beyond the time the application for a permanent certificate of public convenience and necessity had been finally determined.

The Commission, in authorizing Pan-Atlantic to continue beyond 180 days, the same operations authorized by the temporary authority, determined that the operation was of a continuing nature and that Pan-Atlantic had filed a sufficient and timely application within the meaning of section 9 (b) of the Administrative Procedure Act. Accordingly, the Commission concluded that it was required by the last sentence of section 9 (b) to permit the continuance of the operations authorized by the temporary authority until the pending application for permanent authority had been finally determined.

Appellees instituted this action in the United States District Court to vacate, annul, and set aside the Commission's order of October 28, 1955, which authorized the continuance of operation by Pan-Atlantic pending the conclusion of the proceedings on the application for a certificate of public convenience and necessity.

The District Court held that the case was ruled, in principle, by the prior decision of that court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954), and that "with the usual deference to precedent common in this court" it should adhere to the conclusion reached in that case. In a concurring statement, two of the three judges constituting the District Court stated that were they not, as they conceived it, bound by the prior ruling in the *Stone's Express case, supra,* they would conclude that "by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955." It will be noted that one of the judges joining in this concurring statement had participated in and approved the conclusion in the *Stone's Express case, supra,* and that this statement indicates a reversal of opinion from that expressed in the *Stone's* case.

In *Stone's Express, Inc.* v. *United States, supra,* the District Court held that section 9 (b) of the Administrative Procedure Act did not authorize the Commission to extend a similar, but not identical, temporary authority (issued under Section 210a (b) of the Interstate Commerce Act (49 U. S. C. 310a (b)) beyond the 180-day limit upon such grants stated in Section 210a (b). An appeal from this decision was taken

to this Court, which noted probable jurisdiction. *Interstate Commerce Commission* v. *Stone's Express, Inc.*, 348 U. S. 886. That appeal became moot before it was decided by this Honorable Court, by the final determination of the permanent authority application by the Commission. Upon stipulation of the parties, the case was remanded to the District Court for dismissal as moot. 350 U. S. 906.

THE QUESTION IS SUBSTANTIAL

The question involved in this appeal is of great importance to the public in need of transportation services, to the many carriers whose operations may be affected, and to the Commission in the administration of the Interstate Commerce Act. National Transportation Policy, 49 U. S. C., preceding Section 1.

In issuing water carrier temporary authorities under Section 311 (a), (as well as motor carrier temporary authorities under the corresponding provisions of Section 210a (a)) the Commission must find that there is an immediate and urgent need for service which cannot be rendered by the existing authorized carriers. Frequently the need for service extends beyond the 180-day period for which temporary authority may be granted under these provisions. In that event, the carrier usually will file an application for a permanent certificate or permit, either before or after the granting of the temporary authority. Frequently the Commission is unable to conclude the proceeding on the permanent authority application before the expiration of the 180-day period, in which case the Commission,

according to its interpretation, may authorize the applicant to continue the operation until the determination of the permanent authority application. If the Commission is without power thus to extend temporary operating authorities pursuant to Section 9 (b) of the Administraive Procedure Act, carriers will be forced to discontinue such temporary operation at the end of the 180-day period, regardless of the public need or the financial consequences to the carrier. The broad practical importance of the question is indicated by the fact that during the past five years such extensions of water carrier temporary authorities in excess of 180 days has averaged more than five per year, and during the same period similar extension of motor carrier authorities averaged 394 per year. On August 31, 1956, there were outstanding a total of 385 water carrier and motor carrier temporary authorities issued under Section 210a (a) or 311 (a), which had been extended beyond 180 days under Section 9 (b) of the Administrative Procedure Act, pending the determination of permanent authority applications. In addition, there were in effect 60 extensions of temporary acquisition authority under the related provisions of Section 210a (b).

The Commission, soon after the enactment of the Administrative Procedure Act, adopted the interpretation of Section 9 (b) with respect to temporary authorities issued under Sections 210a (a) and 311 (a) which is challenged in the present case and it has since consistently followed that interpretation. The first orders extending temporary authorities in accordance with this interpretation were issued by

Division 5 of the Commission during the month of September, 1947. This practice has been reported to Congress in the Annual Reports of the Commission, for example, the Annual Report for the year 1948, page 103, contains the following entry: "Extension of temporary authorities under Section 9 (b), (5 U. S. C. 1008 (b))," listing the total number of such extensions for that year as 782. On June 6, 1948, the Commission adopted and published in the Federal Register (13 F. R. 4150) rules governing the procedure for extending under Section 9 (b), temporary authorities authorizing the continuance of operations established under Sections 210a (a) and 311 (a) (Appendix F).[1]

The only court decisions on the question at issue in this case, whether Section 9 (b) of the Administrative Procedure Act authorizes or requires extension beyond 180 days of operations conducted under Sections 210a (a) and (b) and 311 (a) and (b) of the Interstate Commerce Act, are the *Stone's Express, Inc., supra,* and the case now before the Court. As previously pointed out herein in the "Statement of the Case," p. 6, the District Court in *Stone's Express, Inc.,* held that the Commission was not empowered by Section 9 (b) of the Administrative Procedure Act to

[1] The Civil Aeronautics Board, under Section 416 of the Civil Aeronautics Act issues temporary exemptions for the operation of aircraft. The Board has interpreted Section 9 (b) of the Administrative Procedure Act as applicable to such temporary exemptions, in a manner similar to the interpretation placed on Section 9 (b) by this Commission. This is shown by the Board's regulations governing the extension of exemptions under that provision, published as Part 200, Title 14, of the Code of Federal Regulations.

authorize the continuance of an operation conducted under temporary authority issued under Section 210a (b) beyond the 180-day limitation in that subsection. In the present case a majority of the Court stated that except for the fact that they considered themselves to be bound by the prior decision in the *Stone* case, they would hold that the Commission is empowered to make such extensions under Section 9 (b). There is, therefore, a conflict in the views of the judges comprising the District Court in these two cases. Moreover, this Court noted jurisdiction in the *Stone's Express* case. These circumstances indicate that the question is one of substantial difficulty which should be resolved by this Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel.
JAMES A. MURRAY,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1956.

APPENDIX A

Civil Action No. 56–232–W

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, AND PAN-ATLANTIC STEAMSHIP CORPORATION, INTERVENING DEFENDANTS

Before MAGRUDER, *Circuit Judge*, and FORD and WYZANSKI, *District Judges*.

W. Q. KEENAN,
EDMUND M. SWEENEY,
For Plaintiffs.

STANLEY N. BARNES,
Assistant Attorney General,
ANTHONY JULIAN,
United States Attorney,
JAMES E. KILDAY,
ALBERT PARKER,
For the United States of America.

ROBERT W. GINNANE,
General Counsel,
JAMES A. MURRAY,
Associate General Counsel,
For the Interstate Commerce Commission.

JAMES JULIAN WEINSTEIN,
WARREN PRICE,
DAVID G. MACDONALD,
MACLEAY, LYNCH & MACDONALD,
WILLIAM H. ARMBRECHT,
For Pan-Atlantic Steamship Corp.

OPINION of the COURT

May 17, 1956

Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan-Atlantic Steamship Corp. for temporary authority under § 311 (a) of the Interstate Commerce Act, as amended (49 U. S. C. § 911 (a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp. to operate as a common carrier by water between certain named Atlantic and Pacific ports up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp. to continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days pre-

scribed in § 311 (a). The Commission, on the other hand, claims that its more extended order is sanctioned by § 9 (b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc.* v. *United States,* 122 F. Supp. 955 (1954). (Our judgment was subsequently vacated for mootness pursuant to stipulation of the parties, *Interstate Commerce Commission* v. *Stone's Express, Inc.,* 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in § 210a (b) of the Interstate Commerce Act (49 U. S. C. § 310a (b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc.* v. *United States,* supra.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge.* I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra,* and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc.* v. *United States,* D. Mass., 122 F. Supp. 995 (1954), I should conclude that, by virtue of § 9 (b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge FORD agrees with this view.

APPENDIX B

[Printed at 122 F. Supp. 955]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 54-187-M

STONE'S EXPRESS, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL, DEFENDANTS

Before HARTIGAN, *Circuit Judge,* and FORD and MCCARTHY, *District Judges.*

OPINION OF THE COURT

May 25, 1954

HARTIGAN, *Circuit Judge.* This is an action brought against the United States of America and the Interstate Commerce Commission under the provisions of 28 U. S. C. §§ 1336, 2321 through 2325 inclusive, in which the plaintiff seeks to enjoin and vacate an order of the Commission dated January 19, 1954, granting to St. Johnsbury Trucking Company, Inc., temporary approval to lease all the operating rights of Hinsch Transportation Co., Inc., St. Johnsbury and Hinsch intervened as parties defendants under the provisions of 28 U. S. C. § 2323.

On April 12, 1954, the plaintiff, pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, made a motion for an order granting its judgment on the

pleadings. The material allegations of the complaint admitted by the defendants and the intervenors and the orders of the Commission annexed to the pleadings establish the following facts.

The plaintiff, a Massachusetts corporation, is engaged in interstate commerce as a motor common carrier under a Certificate of Public Convenience and Necessity issued by the Commission. On November 27, 1951, St. Johnsbury, a Vermont corporation, and Hinsch, a New York corporation, both common carriers operating under Certificates of Public Convenience and Necessity issued by the Commission, filed a joint application under Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, for approval of a proposed purchase by St. Johnsbury of Hinsch's certificate. Simultaneously with the filing of said application, St. Johnsbury and Hinsch sought temporary authority under Section 210a (b) of the Interstate Commerce Act, 49 U. S. C. § 310a (b), to conduct operations for which permanent authority was sought in the Section 5 application. On December 18, 1951, Division 4 of the Commission entered an order which granted the application under Section 210a (b) and authorized St. Johnsbury to lease all the operating rights of Hinsch for a period not exceeding 180 days. On June 3, 1952, Division 4 entered an order extending the temporary authority previously granted by the December 18, 1951, order until "* * * the application filed herein for authority under Section 5 of the Interstate Commerce Act is 'finally determined' as that term is defined * * *" in 49 Code Fed. Regs. § 2.1 to 2.3. By an order dated July 2, 1953, Division 4 denied the Section 5 application of St. Johnsbury and Hinsch, but subsequent orders postponed the termination of St. Johnsbury's temporary authority granted by the Decem-

ber 18, 1951, and June 3, 1952, orders until December 15, 1953. On January 19, 1954, the Commission vacated and set aside the July 2, 1953, order of Division 4, and entered an order which approved the Section 5 application and extended the temporary authority previously granted to St. Johnsbury. The plaintiff's petition for reconsideration of this order with respect to the extension of the temporary authority was denied by the Commission on February 23, 1954. By subsequent orders dated April 5, 1954, and April 30, 1954, St. Johnsbury was authorized to purchase the operating rights of Hinsch between July 5, 1954, and August 4, 1954, and effective with the consummation of the authorized transaction or 30 days from July 5, 1954, whichever first occurs, the temporary authority granted by the order entered on December 18, 1951, as amended by the order entered on June 3, 1952, was to be of no further force and effect.

The sole issue presented by the plaintiff's motion for judgment on the pleadings is whether or not the Commission properly granted St. Johnsbury temporary approval to lease all of Hinsch's operating rights for a period exceeding 180 days. The plaintiff argues that under the provisions of Section 210a (b) of the Interstate Commerce Act, 49 U. S. C. § 310a (b),[1] the

---

[1] "§ 310a. *Temporary authority*

* * * * * *

"(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if

§ 2.4 *Termination of Temporary Authority or Approval.* Nothing in these rules shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)).

U. S. GOVERNMENT PRINTING OFFICE 1956

Commission is prohibited from granting a temporary approval beyond a period of 180 days. The defendants on the other hand, contend that by the third sentence of Section 9 (b) of the Administrative Procedure Act, 5 U. S. C. § 1008 (b),[2] St. Johnsbury had the right to operate Hinsch's property under its temporary approval until such time as the Commission finally determined the Section 5 application for permanent authority.

The clear and unambiguous language of Section 210a (b) of the Interstate Commerce Act and of Sec-

---

it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

[2] "§ 1008. *Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.*

"In the exercise of any power or authority—

* * * * * *

"(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. June 11, 1946, c. 324, § 9, 60 Stat. 242."

tion 9 (b) of the Administrative Procedure Act, and their legislative history, compel us to hold that the third sentence of Section 9 (b) does not apply to a temporary approval granted by the Commission under Section 210a (b).

The defendants rely solely on the temporary approval granted to St. Johnsbury by the Commission to sustain their contention that St. Johnsbury was a "licensee" within the meaning of the third sentence of Section 9 (b) of the Administrative Procedure Act. Under the provisions of Section 210a (b), St. Johnsbury obtained the temporary approval to lease all the operating rights of Hinsch only by virtue of having previously filed a Section 5 application for permanent authority. The third sentence of Section 9 (b), however, in using the words "In any case in which the *licensee* has * * * made timely and sufficient application for a renewal or a new license, * * *" indicates that the statute presupposes at the time of the filing of the application the existence of a license. [Italics ours.] The language of the statute thus clearly reveals that it was designed to prevent a license in existence at the time of the filing of the application for a renewal or a new license from terminating until the agency has finally determined whether or not to grant the renewal or the new license. But, at the time St. Johnsbury filed its Section 5 application, it did not have a license permitting it to lease Hinsch's operating rights. It obtained its temporary approval to lease all of Hinsch's operating rights only *after* the Section 5 application had been filed. St. Johnsbury is not, therefore, a "licensee" within the meaning of the third sentence of Section 9 (b) and does not have the right by virtue of that statute to lease Hinsch's

operating rights until the Commission finally determines the Section 5 application.

In addition, the legislative history of the third sentence of Section 9 (b) indicates that the statute was only intended to apply to licenses existing at the time of the filing of the application for a renewal or a new license.

The Senate Judiciary Committee Print, June 1945 of the Administrative Procedure Act, gives the following explanation of Section 9 (b):

> "This subsection is designed to ameliorate the difficulties where private parties are required to secure licenses. * * * The third sentence automatically extends a license in any case in which the licensee has made timely application for renewal but the granting agency fails to act prior to the expiration of the existing license. A similar provision is contained in the licensing procedure act of the State of Ohio (Act of June 3, 1943, sec. 1 amending secs. 154–167 (sic) of the General Code; Amended substitute Senate bill No. 36)." Page 35 of Senate Doc. No. 248, 79th Cong. 2d Sess., entitled "Administrative Procedure Act, Legislative History, 79th Congress."

Said Ohio Act referred to in the Senate Judiciary Committee Print and found in Vol. 120, p. 361, Laws of Ohio, (1943, 1944), states in part:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license *held by said licensee at the time said application was made* where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency." [Italics ours.]

Also, prior to the passage of the Administrative Procedure Act, there is no doubt that under the facts of the instant case the Commission only had authority to grant a temporary approval for a period not exceeding 180 days by the provisions of Section 210a (b). The defendants, therefore, in arguing that the Commission now has authority to grant a temporary approval exceeding 180 days by virtue of the enactment of the Administrative Procedure Act, in effect contend that the third sentence of Section 9 (b) repeals Section 210a (b) by implication. The Supreme Court, however, has frequently stated that a statute will not be held to repeal a prior statute by implication unless no other reasonable construction is possible. *Posadas* v. *National City Bank*, 296 U. S. 497 (1936); *United States* v. *Jackson*, 302 U. S. 628 (1938); *United States* v. *Borden Co.*, 308 U. S. 188 (1939). The intention of the legislature to repeal "* * * must be clear and manifest." *Red Rock* v. *Henry*, 106 U. S. 596, 602 (1882). There must be a "positive repugnancy between the provisions of the new laws and those of the old." *Wood* v. *The United States*, 16 Pet. 342, 363 (1842). We find no such repugnancy between the provisions of §§ 210a (b) and 9 (b). Section 210a (b) in clear and unambiguous terms states that the Commission may grant temporary approval for a period not *exceeding 180 days*. In holding that the third sentence of § 9 (b) does not apply to the temporary approval granted to St. Johnsbury, we are, therefore, following the well established rule of giving effect to both statutes covering the same general subject matter. *United States* v. *Borden Co.*, supra.

A final contention of the defendants is that the Commission pursuant to Section 12 of the Administra-

tive Procedure Act, 5 U. S. C. § 1011,[3] published its interpretation of the third sentence of Section 9 (b) in which it construed that sentence as being applicable to temporary approvals granted under Section 210a (b).[4] The contemporaneous and continued construction of the Commission is entitled to great weight. *United States* v. *Alabama Railroad Co.*, 142 U. S. 615 (1892) *U. S.* v. *Amer. Trucking Ass'ns.*, 310 U. S. 534 (1940). But, because the provisions of §§ 210a (b) and 9 (b) are unambiguous and their directions specific, "* * * there is no power to amend it by regulation." *Koshland* v. *Helvering*, 298 U. S. 441, 447 (1936); See *Alaska Steamship Co.* v. *U. S.*, 290 U. S. 256 (1933); *Social Security Board* v. *Nierotko*, 327 U. S. 358 (1946). "* * * Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority * * *" with respect to the granting of temporary approvals under section 210a (b). *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277, 278 (1929).

The plaintiff's motion for judgment on the pleadings is granted and a permanent injunction will be entered requiring the Commission to set aside and annul its order of January 19, 1954, insofar as that order continues the temporary operations authorized by the Commission.

---

[3] "§ 1011. *Impairment of rights; effect on other laws, separability; subsequent legislation; effective date*

"* * * Every agency is granted all authority necessary to comply with the requirements of this chapter through the issuance of rules or otherwise. * * *"

[4] 49 Code Fed. Regs. § 2.1 to 2.3.

APPENDIX C

ORDER

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 4, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 28TH DAY OF OCTOBER, A. D. 1955

No. W–376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W–376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W–376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W–376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[SEAL] HAROLD D. MCCOY,
Secretary.

APPENDIX D

UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 56–232–W

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM AND THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT, AND THE INTERSTATE COMMERCE COMMISSION AND PAN-ATLANTIC STEAMSHIP CORPORATION, INTERVENING DEFENDANTS

Judgment

This cause came on to be heard on the plaintiffs' motion for leave to amend their complaint and on the motions of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial

Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby ordered, adjudged, and decreed:

(1) That the plaintiffs' motion for leave to file their first amended complaint is granted;

(2) That the plaintiffs' motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I. C. C. Docket No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in intercoastal operations beyond a period of 180 days shall be, and it is hereby vacated, annulled and set aside.

Issued at Boston, Massachusetts, this 25th day of May 1956.

CALVERT T. MAGRUDER,
Judge of the United States Court of Appeals.

FRANCIS J. W. FORD,
United States District Court Judge.

CHARLES E. WYZANSKI, JR.,
United States District Court Judge.

APPENDIX E

Sections 210a (a) and (b) and 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (a) and (b) and 911 (b)):

Sec. 210a. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of a application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future

usefulness in the performance of adequate and continuous service to the public.

Sec. 311. (b) Pending the determination of an application filed with the Commission under this Act for approval of a consolidation or merger of the properties of two or more water carriers, or of a purchase, lease, or contract to operate the properties of one or more water carriers, the Commission may, for good cause shown, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days of operation of the properties of such carriers by water by the person proposing to acquire them, as aforesaid.

APPENDIX F

[Title 49, Code of Federal Regulations, § 2.1–2.4]

PART 2—SPECIAL RULES OF PROCEDURE [REVISED]

TEMPORARY OPERATING AUTHORITIES AND APPROVALS

Sec.

2.1 Extension of temporary operating authorities or approval.
2.2 Definitions and interpretations.
2.3 Additional grant for new need.
2.4 Termination of temporary authority or approval.

* * * * * *

SOURCE: §§ 2.1 to 2.4 appear at 19 F. R. 6228, Sept. 18, 1954.

§ 2.1 *Extension of Temporary Operating Authority or Approval.* The Commission will determine upon written request by any interesed party, or it may determine upon its own initiative, whether under Section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)):

(a) any temporary operating authority granted under 210a (a) or 311 (a) of the Interstate Commerce Act (49 U. S. C. 310a (a), 911 (a)) is continued in force, beyond the expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

(b) any temporary approval granted under Section 210a (b) or 311 (b) of the Interstate Commerce Act (49 U. S. C. 310a (b), 911 (b)), is continued in force, beyond the expiration date specified in such temporary approval, until the determination of the related application for approval of a consolidation or merger of the properties of two or more motor or water

carriers or of a purchase, lease, or contract to operate the properties of one or more such carriers.

In order to afford sufficient time for consideration and action thereon, a written request for such a determination should be filed not later than 30 days prior to expiration of the temporary operating authority or approval.

§ 2.2 *Definitions and Interpretations.* In making the determination provided in Section 2.1, the Commission will be guided by the folowing interpretations of the provisions of the 3rd sentence of section 9 (b) of the Administrative Procedure Act (5 U. S. C. 1008 (b)), and of the provisions of Section 210a (a) of the Interstate Commerce Act (49 U. S. C. 310a (a)):

(a) "Timely Application."—An application for a certificate of public convenience and necessity or a permit filed in accordance with the applicable laws, regulations, and instructions, not later than 60 days after issuance of temporary authority for a period of 180 days or not later than 60 days after issuance of the first of a series of consecutive temporary authorities aggregating 180 days.

(b) "Sufficient Application."—An application for a certificate of public convenience and necessity or a permit, which is in the form, contains the information, and is accompanied by the documents and exhibits required by the applicable laws, regulations, and instructions.

(c) "Aggregate of 180 days."—As used in Section 210a (a) of the Act and Commission notices and orders relating thereto, the term "for not more than an aggregate of one hundred and eighty days" means the total number of days of temporary authority which may be granted to a motor carrier under the provisions of that Section of the Act to meet a continuing need for a particular service.

(d) "Series of grants."—As relates to extensions of temporary authorities under Section 9 (b) of the administrative Procedure Act [5 U. S. C. 1008 (b)], only those grants of temporary authority for less than 180 days which have been approved to meet a specific continuing need and which follow one after the other without interruption for a total of 180 days will be considered as a "series of consecutive temporary authorities aggregating 180 days."

(e) "Need considered not to be of a continuing nature."—Any need which is the basis of an operation authorized by a temporary authority or approval to be conducted for a period of less than an aggregate of 180 days is presumed not to be of a "continuing nature" unless the Commission otherwise expressly determines.

(f) "Final determination of Application."—For the purpose of this Section—

(1) An application for a certificate or permit shall be considered to be "finally determined" (i) with respect to operations for which the certificate or permit is denied, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) with respect to operations for which the certificate or permit is granted, when the certificate or permit becomes effective.

(2) An application for approval of a consolidation or merger of the properties of two or more motor or water carriers, or of a purchase of the properties of one or more such carriers shall be considered to be "finally determined", (i) in the case of denial of such an application, upon the expiration of the pe-

riod allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the case of approval of such an application, when the certificate or permit to be transferred in connection with such application has been reissued in the name of the transferee and has become effective.

(3) An application for approval of a lease or contract to operate the properties of one or more motor or water carriers shall be considered to be "finally determined", (i) in the case of denial of such an application, upon the expiration of the period allowed by the rules and regulations of the Commission or by the order (whichever is greater) within which petitions for rehearing, reargument, or reconsideration may be filed, or upon the denial of such petitions if filed, and (ii) in the ~~case of~~ approval of such an application, when the order approving such application becomes effective.

§ 2.3 *Additional Grant for New Need.* If the need for a particular service ceases and the temporary authority covering such need expires or is revoked and a new or separate need arises subsequent to such expiration or revocation, additional temporary authority for the 180-day aggregate, or for a shorter period, may be granted to the same carrier for the service notwithstanding the prior grant or grants. However, an application filed after the expiration or revocation of temporary authority for an aggregate of 180 days will be denied unless the facts clearly show that the application is in reality based on a new need and not on a continuation of the need on which the prior grant of authority was based.